No. 13,156

IN THE

United States Court of Appeals

For the Ninth Circuit

STERLING CARR, Trustee of the Estate of Nippon Yusen Kaisya (a corporation), Bankrupt, *Appellant*,

vs.

THE YOKOHAMA SPECIE BANK, LTD., OF SAN FRANCISCO (a foreign corporation), and MAURICE C. SPARLING, as Superintendent of Banks of the State of California and Liquidator of The Yokohama Specie Bank, Ltd., San Francisco Office, *Appellees*.

On Appeal from the District Court of the United States, for the Northern District of California.

BRIEF FOR APPELLEES, THE YOKOHAMA SPECIE BANK, LTD., OF SAN FRANCISCO, A FOREIGN CORPORATION, AND MAURICE C. SPARLING, AS SUPERINTENDENT OF BANKS OF THE STATE OF CALIFORNIA AND LIQUIDATOR OF THE YOKOHAMA SPECIE BANK, LTD., SAN FRANCISCO OFFICE.

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PERNAU-WALSH PRINTING CO., SAN FRANCISCO

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JURISDICTION.

Appellant's statement of jurisdiction is erroneous in that the jurisdiction of the United States District Court was not invoked under U. S. Code Title 28,

Section 1332. The jurisdiction of the United States District Court was invoked under the Bankruptcy Act of July 1, 1898, Sec. 23, as Amended May 27, 1926, C. 406, Sec. 8, 44 Stat. 664; June 12, 1938, C. 575, Sec. 1, 52 Stat. 85; 11 U.S.C.A. Sec. 46b as disclosed by the pleadings and facts in that Sterling Carr, as Trustee of the Estate of Nippon Yusen Kaisya, a corporation, bankrupt, commenced this action in the United States District Court for the Northern District of California, Southern Division, and appellees by filing an Answer to the Complaint of said Trustee, consented to the jurisdiction of said District Court. (R. 3-22.)

Schumacher v. Beeler (1934) 293 U.S. 367, 55 S. Ct. 230, 79 L. Ed. 433.

"Suits by the trustee shall only be brought or prosecuted in the courts where the bankrupt, whose estate is being administered by such trustee, might have brought or prosecuted them if proceedings in bankruptcy had not been instituted, unless by consent of the proposed defendant, except suits for the recovery of property under section 96, subdivision b of this title; section 107, subdivision e, of this title; and section 110, subdivision e, of this title." Act of July 1, 1898 Sec. 23, as Amended May 27, 1926, C. 406, Sec. 8, 44 Stat. 664; June 12, 1938, C. 575, Sec. 1, 52 Stat. 85; 11 U.S.C.A. Sec. 46b.

STATUTES AND PERTINENT REGULATIONS INVOLVED.

The deposits and withdrawals in the bank account involved herein were subject to the provisions of the following statutes, executive orders and regulations:

"(b)(1) During the time of war or during any other period of national emergency declared by the President, the President may, through any agency that he may designate, or otherwise, and under such rules and regulations as he may prescribe, by means of instructions, licenses, or otherwise—

(A) investigate, regulate, or prohibit, any transactions in foreign exchange, transfers of credit or payments between, by, through, or to any banking institution, and the importing, exporting, hoarding, melting, or earmarking of gold or silver coin or bullion, currency or securities, and

(B) investigate, regulate, direct and compel, nullify, void, prevent or prohibit, any acquisition holding, withholding, use, transfer, withdrawal, transportation, importation or exportation of, or dealing in, or exercising any right, power, or privilege with respect to, or transactions involving, any property in which any foreign country or a national thereof has any interest,

by any person, or with respect to any property, subject to the jurisdiction of the United States; and any property or interest of any foreign country or national thereof shall vest, when, as, and upon the terms, directed by the President, in such agency or person as may be from time to time by

the President, and upon such terms and conditions as the President may prescribe such interest or property shall be held, used, administered, liquidated, sold, or otherwise dealt with in the interest of and for the benefit of the United States, and such designated agency or person may perform any and all acts incident to the accomplishment or furtherance of these purposes; and the President shall, in the manner hereinabove provided, require any person to keep a full record of, and to furnish under oath, in the form of reports or otherwise, complete information relative to any act or transaction referred to in this subdivision either before, during, or after the completion thereof, or relative to any interest in foreign property, or relative to any property in which any foreign country or any national thereof has or has had any interest, or as may be otherwise necessary to enforce the provisions of this subdivision, and in any case in which a report could be required, the President may, in the manner hereinabove provided, require the production, or if necessary to the national security or defense, the seizure, of any books of account, records, contracts, letters, memoranda or other papers, in the custody or control of such person; and the President may, in the manner hereinabove provided, take other and further measures not inconsistent herewith for the enforcement of this subdivision."

Trading With the Enemy Act of 1917, Oct. 6, 1917, c. 106, Sec. 5, 40 Stat. 415, as amended; 50 U.S.C.A. App. Sec. 5(b)(1); 12 U.S.C.A. Sec. 95a.

"By virtue of and pursuant to the authority vested in me by Section 5(b) of the Act of October 6, 1917 (40 Stat. 415) (section 95a of this title), as amended, by virtue of all other authority vested in me, and by virtue of the existence of a period of unlimited national emergency, and finding that this Order is in the public interest and is necessary in the interest of national defense and security, I, Franklin D. Roosevelt, President of the United States of America, do prescribe the following:

Section 1. Certain foreign banking transactions prohibited.

All of the following transactions are prohibited, except as specifically authorized by the Secretary of the Treasury by means of regulations, rulings, instructions, licenses, or otherwise, if (i) such transactions are by, or on behalf of, or pursuant to the direction of any foreign country designated in this Order, or any national thereof, or (ii) such transactions involve property in which any foreign country designated in this Order, or any national thereof, has at any time on or since the effective date of this Order had any interest of any nature whatsoever, direct or indirect:

A. All transfers of credit between any banking institutions within the United States; and all transfers of credit between any banking institution within the United States and any banking institution outside the United States (including any principal, agent, home office, branch, or correspondent outside the United States, of a banking institution within the United States):

B. All payments by or to any banking institution within the United States; . . .

F. Any transaction for the purpose of which has the effect of evading or avoiding the foregoing prohibitions.

Section 2. Dealings in foreign securities; regulations.

A. All of the following transactions are prohibited, except as specifically authorized by the Secretary of the Treasury by means of regulations, rulings, instructions, licenses, or otherwise;

(1) The acquisition, disposition, or transfer of, or other dealing in, or with respect to, any security or evidence thereof on which there is stamped or imprinted, or to which there is affixed or otherwise attached, a tax stamp or other stamp of a foreign country designated in this Order or a notarial or similar seal which by its contents indicates that it was stamped, imprinted, affixed or attached within such foreign country, or where the attendant circumstances disclose or indicate that such stamp or seal may, at any time, have been stamped, imprinted, affixed or attached thereto; and

(2) The acquisition by, or transfer to, any person within the United States of any interest in any security or evidence thereof if the attendant circumstances disclose or indicate that the security or evidence thereof is not physically situated within the United States.

B. The Secretary of the Treasury may investigate, regulate, or prohibit under such regulations, rulings, or instructions as he may prescribe, by

means of licenses or otherwise, the sending, mailing, importing or otherwise bringing, directly or indirectly, into the United States, from any foreign country, of any securities or evidences thereof or the receiving or holding in the United States of any securities or evidences thereof so brought into the United States.

Section 3. Foreign countries affected; effective date of prohibitions.

The term 'foreign country designated in this Order' means a foreign country included in the following schedule, and the term 'effective date of this Order' means with respect to any such foreign country, or any national thereof, the date specified in the following schedule: . . .

(k) June 14, 1941—China, and Japan . . .

A. The Secretary of the Treasury and/or the Attorney General may require, by means of regulations, rulings, instructions, or otherwise, any person to keep a full record of, and to furnish under oath, in the form of reports or otherwise, from time to time and at any time or times, complete information relative to, any transaction referred to in section 5(b) of the Act of October 6, 1917, 40 Stat. 415, as amended, or relative to any property in which any foreign country or any national thereof has any interest of any nature whatsoever, direct or indirect, including the production of any books of account, contracts, letters, or other papers, in connection therewith, in the custody or control of such persons, either before or after such transaction is completed; and the Secretary of the Treasury and/or the Attorney General may, through any agency, investigate

any such transaction or act, or any violation of the provisions of this Order."

Executive Order No. 8389, as Amended, April 10, 1940, 5 F. R. 1400; 12 U.S.C.A. Sec. 95a, p. 456-457.

STATEMENT OF THE CASE INCLUDING FACTUAL MATTERS INVOLVED.

Appellant's statement of the case cannot be accepted as in material matters it is unsupported by the evidence, omits material facts of the case and is argumentative. Appellant, as trustee in bankruptcy of Nippon Yusen Kaisya, commenced this action in equity to impress in favor of the bankrupt, a resulting trust upon a certain bank account maintained in The Yokohama Specie Bank, Ltd. San Francisco Office, in the name of *Consul General Yoshio Muto, Special Account,* with a balance therein of $66,884.15.

Appellant is the Trustee in Bankruptcy of Nippon Yusen Kaisya, a Japanese corporation.

Appellee, Maurice C. Sparling, is the Superintendent of Banks of the State of California and Liquidator of The Yokohama Specie Bank, Ltd., San Francisco Office, in liquidation, and will be hereinafter referred to as the Superintendent, and said office of said bank will be hereinafter referred to as the local bank.

Appellee, J. Howard McGrath, as successor to James B. Markham, former Alien Property Cus-

todian, intervened in this action by filing a complaint in intervention.

Appellee, The Yokohama Specie Bank, Ltd., is a foreign corporation, organized and existing under and by virtue of the laws of the Empire of Japan, and for a long period prior to the time that the transactions involved in this action arose, maintained an office in the City and County of San Francisco, State of California.

Under Section 7 of the Bank Act of the State of California, Stat. 1909, p. 87, Act 652, as amended, Deering's California General Laws, Vol. I, p. 198, the local bank was required to conduct its business in California as a separate and independent corporation from that of the foreign corporation in the same manner as if all the business and affairs of the foreign corporation conducted in the State of California was that of a separate and independent corporation organized under the laws of the State of California for the purposes of doing a banking business.

Prior to July 26, 1941, Nippon Yusen Kaisya, hereinafter referred to as NYK, had engaged in a general shipping business throughout the world with an office located in San Francisco.

On July 26, 1941, Executive Order No. 8389, as amended, hereinafter referred to as the Freezing Order, was promulgated by the President of the United States, pursuant to the authority given by Section 5b of the Trading With the Enemy Act, 40 Stat. 411, as amended; 50 USCA—Appendix. Said

Freezing Order prohibited all financial transactions between any banking institution in the United States and Japan, or any national thereof, unless licensed by the Treasury Department of the United States, through its local agent, the Foreign Fund Control Office of the Federal Reserve Bank. (R. 302-307; Defendant's Exhibit C.)

It was stipulated between the parties that the opening of the bank account involved and all transactions pursuant thereto, were subject to the Freezing Order.

As a result of the monetary Freezing Order, NYK suspended the operation of its ships and services in the United States. (R. 197-198.)

Prior to October 14, 1941, NYK had owned and operated the steamship vessel Tatsuta Maru (sometimes designated in the record as Tatuta Maru).

On October 14, 1941, the Imperial Government of Japan requisitioned said Tatsuta Maru by formally issuing and serving on NYK Requisition Order No. EN No. 2044. (R. 202-204; Plaintiff's Exhibit 20-E.)

The nature, purpose and extent of said requisitioning as set forth in the requisitioning order was as follows:

> "The Imperial Japanese Government hereby requisitions the M. S. Tatuta Maru of the Nippon Yusen Kaisya with the view of transporting passengers and mail between Japan and the United States.
>
> The Imperial Government is to operate said ship from Yokohama to San Francisco via Honolulu

on the outbound voyage and from San Francisco to Yokohama on the return voyage, in accordance with the schedule appended to this order.

Let it be noted that the Nippon Yusen Kaisya shall, on behalf of the Imperial Japanese Government, conduct those business matters which may arise in regard to the aforementioned voyage, under the direction of a Supervisor who is to embark the Tatuta Maru by the order of the Government and in conformity with the following stipulation . . .

The Nippon Yusen Kaisya shall submit to the Minister of Communications a detailed statement of income and expenditures at the end of the voyage."

(R. 203-204; Plaintiff's Exhibit 20-E, page 6.)

Requisitioning of the vessel was made public in the United States. (Plaintiff's Exhibit 20-E, page 5.)

The employees of NYK were appointed to the personnel of the Ministry of Communications of the the Imperial Government of Japan and engaged in the operation of the vessel. (R. 202.)

On October 17, 1941, the Imperial Government of Japan gave a written Power of Attorney to NYK, to operate the ship as the attorney in fact for the Imperial Government of Japan. (R. 313; Defendant's Exhibit D.) After obtaining the general power of attorney from the Japanese Government, NYK made written application to the United States Treasury Department for a license to handle the Japanese Government requisitioned ship Tatuta Maru in the port

of San Francisco, due to arrive in said port on or about October 30, 1941, and to be operated pursuant to the authority as authorized by the power of attorney executed by Yoshio Muto, Consul General of Japan in San Francisco. NYK stated therein under oath that all receipts and all disbursements arising from the operation of said vessel were independent and had no connection with NYK funds. (R. 309-311.)

Due to the application of the Freezing Order to Japan and the nationals thereof, over 2000 Japanese nationals were left stranded in the United States. The Japanese Government was anxious to return its nationals to Japan. Among Japanese nationals remaining in the United States desiring transportation to Japan were employees of NYK. The Japanese Government had attempted to persuade the American Government to exempt NYK from the Freezing Order. Negotiations by the Japanese Government with the United States Government for the exemption of NYK from the Freezing Order were unsuccessful. (R. 193-202; Plaintiff's Exhibit 20-E.)

On the 21st day of October, 1941, a written application was made to the Treasury Department of the United States by the Japanese Government through Yoshio Muto, Consul General of Japan, requesting that the local bank be allowed to receive a remittance in the sum of $39,000 from the Japanese Government for deposit into a blocked account in the name of Yoshio Muto for the purpose of making ship disburse-

ments for the Japanese Government requisitioned ship. (R. 258, 314-317; Plaintiff's Exhibit 22.) In said application, the Japanese Government expressly represented and warranted therein that no one other than the Japanese Government had any direct or indirect interest in the remittance for which a license was applied for therein.

Pursuant to said application of October 21, 1941, the Treasury Department of the United States issued license No. S. F. 11630, authorizing the Consul General of Japan in San Francisco to receive a remittance from the Imperial Japanese Government through The Yokohama Specie Bank, Ltd., Tokyo Office, upon the condition that the money be deposited into a Special Blocked Account in the name of Yoshio Muto, Consul General of Japan, solely for the purpose of making ship disbursements pursuant to special licenses authorizing said disbursements. Said license No. S. F. 11630 was granted on October 29, 1941. (R. 258-259, 320-322.)

On October 24, 1941, a written application was made to the Treasury Department of the United States by the Japanese Government through Yoshio Muto, Consul General of Japan, requesting that the local bank be allowed to receive the sum of approximately $68,000 into the account involved, resulting from the collection of passage fares from the operation of the Japanese Government requisitioned ship. Again, in the application dated October 24, 1941, the Imperial Government of Japan admitted under oath

that no one other than the Imperial Government of Japan had any interest in the income to arise from the operation of the ship involved. (R. 317; Plaintiff's Exhibit No. 29.)

On October 29, 1941, the bank account involved was opened in the local bank with an initial deposit of $39,000 in the name of Consul General Yoshio Muto Special Account by means of a telegraphic transfer of funds from The Yokohama Specie Bank, Ltd., Tokyo Office, to the local bank. (R. 94, 256, 261-262; Plaintiff's Exhibits Nos. 1, 21, 24, 25 and 26.)

Between October 29, 1941 and November 22, 1941, there was deposited in the account in addition to the original deposit of $39,000 the further sum of $66,-811.42. (R. 256; Plaintiff's Exhibit 21.) This additional deposit represented income from the sale of tickets for passage fares and excess baggage and mail charges collected by the Japanese Government through its agent, NYK. (R. 102-106, 108-109, 332-336; Plaintiff's Exhibits Nos. 4 and 5, Defendant's Exhibits J and K.)

Between November 1, 1941 and December 2, 1941, there was withdrawn from said account the total sum of $39,053.28. All withdrawals were pursuant to applications filed with the United States Treasury Department and licenses issued pursuant to said applications. Again in each application for withdrawal, the Japanese Government through its Consul, stated and warranted under oath that no one other than the Japanese Government had any interest in the funds

in said account. (R. 256, 325-332; Plaintiff's Exhibit No. 21, Defendant's Exhibits Nos. E, F, G, H, I and J.)

The Japanese Government through the Consul General applied for and obtained a license for the payment of an agency fee of $4,771.45 to NYK as and for the handling commission on passage and excess baggage and freight collected by NYK as agent for the Japanese Government. (R. 332-336; Defendant's Exhibits J and K.) Payment of said agency fee was thereafter made to NYK out of the account involved. (R. 343-344.)

On December 8, 1941, the day after Pearl Harbor, the bank was taken over by the Superintendent of Banks of the State of California for the purposes of conservatorship and/or liquidation under Sections 135c and 136 of the Bank Act of the State of California. Stat. 1909, Act 652, as Amended, Deering's California General Laws, Vol. I, pages 295, 299.

On July 2, 1942, NYK was adjudicated a bankrupt corporation and ever since said date appellant has been the trustee of the estate of the bankrupt corporation. On October 3, 1942, under the authority of the Trading With the Enemy Act, as amended, and Executive Order No. 9095, as amended, the Alien Property Custodian of the United States served upon the Superintendent, Supervisory Order No. 39 and Vesting Order No. 1324. Under said Supervisory Order No. 39 the Superintendent undertook the supervision of the business enterprise and property of

The Yokohama Specie Bank, Ltd., San Francisco Office, pursuant to the authority granted and the terms set forth in said supervisory order, and in accordance with and pursuant to the laws of the State of California. (R. 296-306.)

The Alien Property Custodian, acting under the authority granted by the Trading With the Enemy Act, as amended, and pursuant to the powers delegated to him by the pertinent Executive Orders, issued and served upon the Superintendent Vesting Order No. 256, dated October 27, 1942, as amended by Amendment to Vesting Order No. 256, dated September 7, 1942, and Vesting Order No. 371, dated November 18, 1942, vesting and seizing all interests of Yoshio Muto or the Imperial Government of Japan in the bank account. (R. 350-352; Exhibit for Intervening Plaintiff No. 1.)

Contrary to the assertion by appellant, there was never an agreement between the United States Government and the Japanese Government that vessels of two Japanese steamship lines, NYK and Osaka Shosen Kaisya, should or would be dispatched to the United States as *nominally* Japanese Government requisitioned ships. The United States Government informed the Japanese Government that it would require that the vessels be requisitioned with due formality by the Japanese Government and that copies of the requisition papers be attached to the diplomatic papers forwarded to the American Embassy, and required that the Japanese Government state therein that the vessels were under Government missions. In

addition, the United States Government required the Japanese Government to make public the fact that the vessel had been requisitioned by the Japanese Government. (R. 199-201.)

While it may be true that the Japanese Government in statements made years after the transaction involved had been completed, stated that if a loss occurred in the operation of the vessel the Japanese Government after examining the actual operating expenses would compensate NYK for the actual loss incurred, there is no evidence in the record from which it can even be inferred that NYK or any other persons incurred a loss in the operation of the vessel.

While it may be true that employees of NYK furnished some services for the operation of said vessel and kept the records thereof, they did so as agents on behalf of the Japanese Government. The Imperial Government of Japan gave a written power of attorney to NYK to operate the ship as the attorney in fact for the Imperial Government of Japan. (R. 313.) In addition, on the 22nd day of October, 1941, NYK, in a written verified application to the Treasury Department of the United States, admitted that NYK was acting solely as authorized by the power of attorney. (R. 309-312.) It is true that NYK, as agents, kept the list of passengers and passage money collected for the voyage involved in an account book containing records for prior voyages made by NYK's ships. However, each entry was stamped to reflect the fact that the ship was a "Japanese Government requisitioned ship". (Plaintiff's Exhibits 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12 and 17.)

QUESTIONS PRESENTED BY ERRORS ASSIGNED BY APPELLANT.

The errors assigned by appellant present the following questions:

I. Did the trial court fail to make a finding of fact as to whether NYK furnished or provided the consideration represented by the balance in the bank account involved?

II. Was there a real and substantial conflict in the evidence as to who operated the ship involved or as to who furnished and provided the consideration represented by the balance in the bank account involved?

III. Was the finding of fact of the trial court that "on October 14, 1941, the Imperial Government of Japan requisitioned the steamship vessel 'M. S. Tatuta Maru' and operated said steamship vessel from October 14, 1941 to and including December 7, 1941 for the purpose of returning Japanese nationals located in the United States to Japan" clearly erroneous?

IV. Even if NYK did furnish or provide the consideration represented by the balance in the bank account, involved, can the court give judicial recognition to NYK's beneficial ownership?

SUMMARY OF ARGUMENT.

I. Appellant did not meet the burden of proof required to establish the elements of a resulting trust.

II. Findings of fact shall not be set aside unless clearly erroneous.

III. The trial court found as a finding of fact upon clear and substantial evidence that NYK did not provide or furnish the consideration or money in the balance of said bank account.

IV. The opinion of the trial court provides a clear understanding for the basis of the trial court's decision, and even the absence of a finding as to whether NYK furnished or provided the consideration or money would not constitute reversible error.

V. There was a substantial conflict in the evidence as to who provided or furnished the consideration or money represented by the balance in the bank account.

VI. Clear and substantial evidence sustains the finding of fact that the "Tatuta Maru" was a Japanese Government requisitioned vessel.

VII. Even if NYK did furnish or provide the consideration or money reflected in the balance in the bank account, it was an illegal transaction in violation of Federal Laws and cannot be given judicial recognition.

ARGUMENT.

I.

APPELLANT DID NOT MEET THE BURDEN OF PROOF REQUIRED TO ESTABLISH THE ELEMENTS OF A RESULTING TRUST.

Legal title to the balance in the bank account stood in the name of "Consul General—Yoshio Muto Special Account". Appellant asserts that a resulting trust is imposed by law upon the bank account in

favor of NYK because all moneys in said account were funds of NYK, including proceeds of sales of passenger tickets for the Japanese Government requisitioned vessel "Tatuta Maru". (Appellant's Opening Brief page 3.) It is agreed by all parties that Yoshio Muto did not maintain the bank account in his individual capacity, but instead maintained the bank account in his representative capacity as Consul General for the Empire of Japan.

Since legal title is in the Empire of Japan, and appellant is trying to establish by parol and circumstantial evidence that the Empire of Japan did not really have the beneficial interest in said bank account, the law is well established that the burden was upon appellant to establish by clear, satisfactory, unambiguous, and convincing evidence the elements of a resulting trust.

Hansen v. Bear Film Company, Inc. (1946), 28 Cal. (2d) 154, 168 P. (2d) 946;

Rowland v. Clark (1949), 93 C.A. (2d) 880, 206 P. (2d) 59;

Norman v. Burks (1949), 93 C.A. (2d) 687, 209 P. (2d) 815;

McQuin v. Rice (1948), 88 C.A. (2d) 914, 199 P. (2d) 742;

Redsted v. Weiss (1946), 73 C.A. (2d) 889; 167 P. (2d) 735;

Kobida v. Hinkelmann (1942), 53 C.A. (2d) 186, 127 P. (2d) 657.

As stated in *Kobida v. Hinkelmann* (supra) at page 188:

". . . it is well settled that such trusts must be proved by parol evidence, but that the evidence must be clear, satisfactory and convincing. . . ."

In *McQuin v. Rice* (supra) at page 918, the court stated the rule as follows:

"A person in whose name the legal title . . . is vested is presumed to be the absolute owner thereof; and one who claims a resulting trust . . . must establish by clear, convincing and unambiguous testimony the precise amount or proportion of the consideration furnished by him . . . in order that the court may determine the respective rights of the parties in the property purchased; otherwise the legal title will prevail."

The question whether the showing made is clear and convincing is one for the trial court.

Hansen v. Bear Film Co., Inc. (supra);

Beeler v. American Trust Co. (1944), 24 Cal. (2d) 1; 147 P. (2d) 583;

Stromerson v. Averill (1943), 22 Cal. (2d) 808; 141 P. (2d) 732.

In *Hansen v. Bear Film Company, Inc.* (supra) at page 173 the court said:

"Although it is necessary, in order to establish a trust, to offer clear and convincing proof, such proof may be indirect, consisting of acts, conduct and circumstances . . . the question whether the showing is clear and convincing is primarily one for the trial court."

These rules should be strictly applied where, as in this case, appellant comes into court claiming a title

which must necessarily be founded upon evidence showing that it was initiated in fraud in violation and circumvention of the United States Government Freezing Orders and was consummated by perjury through false representation in applications for licenses to the U. S. Treasury Department to which NYK was an acting participant.

The trial court in giving recognition to the above rules stated as follows:

> "However, it is axiomatic that to establish a resulting trust, the evidence must be clear and convincing." (R. 46.)

In applying the rule, the trial court first gave full recognition to appellant's contention as follows:

> "Plaintiff does not dispute the foregoing facts but contends that the requisition of the Tatuta Maru was not a bona fide transaction; that, on the contrary, it was a matter of form only, done to enable the ship to enter and leave American ports without interference from NYK's American creditors and carried out with the knowledge and approval of the United States Department of State; that NYK in fact furnished the money with which the Japanese Government opened the special account in The Yokohama Specie Bank, Ltd., San Francisco, and was thus the beneficial owner thereof; and that the Attorney General, as successor to the Alien Property Custodian stands in no better position with relation to such accounts than would the Government of Japan." (R. 45 Memorandum Opinion.)

The learned and able trial judge then proceeded to summarize the nature and extent of the evidence introduced by appellant in support of the facts which appellant claimed gave rise to a resulting trust, as follows:

> "To support his position the plaintiff introduced documentary evidence and the deposition of one Seishi Hiroyoshi taken in Tokyo on interrogatories and cross-interrogatories. Much of this evidence was admitted subject to motion to strike on the ground that it was hearsay and no foundation had been laid. The deposition discloses that the witness was employed in NYK's Tokyo Office several years later. The Court was liberal in admitting such evidence, having in mind that this is an action in equity. In this case, while there is evidence of questionable competence that indicates that NYK furnished the money with which the Special Account was opened, it does not follow that a trust relationship was thereby created. *To find such a trust relationship the Court would have to rely on opinions and conclusions of the witness and on certain correspondence had between NYK Tokyo and Japanese Government officials, months and even years after the events herein and after the interests of the United States had intervened.*" (Emphasis added.) (R. 46.)

The trial court in weighing the evidence introduced by appellant summarized the factual evidence introduced by appellee, as follows:

> "When this evidence is weighed against the undisputed evidence that the Tatuta Maru was operated as a Japanese Government requisitioned

> vessel, that NYK and the Government of Japan stated under oath that no one other than the Government of Japan had any interest in the bank account involved, and that NYK applied for and received permission from the Treasury Department to be paid an agency fee for its handling of the ship . . ." (R. 47.)

and the court found that appellant's evidence "falls short of meeting the 'clear and convincing' test necessary to establish a resulting trust".

In view of NYK's written admissions under oath made at the time the transaction occurred that it did not have any interest in the bank account, direct or indirect, together with the fact that the legal owner of the bank account represented and warranted under oath that no one other than the legal owner had any interest, direct or indirect, in the bank account, it is respectfully submitted that the trial court did not err in finding that appellant had failed to establish by clear, convincing, unambiguous and satisfactory evidence the necessary elements to establish a resulting trust.

As stated by this court in the case of *Bjornson v. Alaska Steamship Co.* (1951), U. S. Court of Appeals, Ninth Circuit, 193 Fed. (2d) Advance Reports 433: "It is not clearly erroneous for the trial court to choose between two permissible but conflicting views as to the weight of the evidence." (Citing *U. S. v. Yellow Cab Co.,* 338 U.S. 342; 70 S.Ct. 177; 94 L.Ed. 150.)

II.

FINDINGS OF FACT SHALL NOT BE SET ASIDE UNLESS CLEARLY ERRONEOUS.

As outlined above and as will be shown in more detail below under Paragraph V of the argument, there was a sharp conflict in the evidence on what was perhaps one of the most crucial issues involved in this action. The trial court resolved the conflict in appellee's favor.

Under these circumstances, the Appellate Court may not set aside on appeal the findings of fact of the trial court unless the appellant affirmatively shows the findings of fact were clearly erroneous.

> "Findings of Fact shall not be set aside unless clearly erroneous and due regard shall be given to the opportunity of the trial court to judge the credibility of the witness."
>
> U. S. Code, Title 28, Sec. 52; Rule 52 R.C.P.: 28 U.S.C.A. Rule 52;
>
> *United States v. Yellow Cab Co.* (1949), 338 U.S. 338; 94 Lawyer's Ed. 150; 70 Supreme Ct. 177;
>
> *Japanese Imperial Assurance Co. of New York v. Supornick & Dunn, Inc.* (1950), 184 F. (2d) 930.

Appellant has failed to establish any greater grievance than in any case where the evidence would support a conclusion either way, but where the trial court has decided to weigh more heavily for the appellee. Such a choice between two permissible views of the weight of the evidence is not clearly erroneous.

III.

THE TRIAL COURT FOUND AS A FINDING OF FACT UPON CLEAR AND SUBSTANTIAL EVIDENCE THAT NYK DID NOT PROVIDE OR FURNISH THE CONSIDERATION OR MONEY IN THE BALANCE OF SAID BANK ACCOUNT.

Appellant's first alleged assignment of error is that the trial court erred in failing to make a finding on the issue "Did NYK furnish or provide consideration out of which the bank account involved arose?" This alleged assignment of error is untenable.

On August 17, 1951, the trial court rendered and filed its Decision and Opinion. (R. 37-49.) On the same date the trial court made and entered its Findings of Fact and Conclusions of Law, therein finding the facts specially and stating separately its conclusions of law thereon and directing entry of judgment. (R. 49-58.)

It is significant to note that appellant in his argument to support this assigned error does not make any reference whatsoever to the formal Findings of Fact and Conclusions of Law made and entered by the trial court.

It is sufficient if the findings of fact and conclusions of law appear in an Opinion or Memorandum of the trial court, and statements in the trial court's Opinion may be read as a part of the Findings of Fact.

Life Savers Corp. v. Curtiss Candy Co. (1950), 182 F. (2d) 4;

Skelly Oil Co. v. Holloway (1948), 171 F. (2d) 670.

The court is not required to make detailed evidentiary findings.

Norwich Union Indemnity Co. v. Haas (1950), 179 F. (2d) 827.

Nor is it necessary that the trial make findings asserting the negative of each issue of fact raised. It is sufficient if the special affirmative facts found by the court, construed as a whole, negative each rejected contention.

Schilling v. Schwitzer-Cummins Co. (1944), 142 F. (2d) 82.

As stated in *Maher v. Hendrickson,* U. S. Court of Appeals, 7th Circuit (1951), 188 F. (2d) 700:

"The ultimate test as to the propriety of findings is whether they are sufficiently comprehensive to provide a basis for decision and supported by the evidence."

Woods v. Oak Park Cheateau Corp., 179 F. (2d) 611;

Shapiro v. Rubens, 166 Fed. (2d) 659;

Life Savers Corp. v. Curtiss Candy Co., 182 F. (2d) 4.

An examination of the formal Findings of Fact and the Findings of Fact contained in the statement made by the trial court in its Opinion conclusively show that the trial court made a finding on this issue of fact.

The trial court gave full recognition to appellant's claim that the trial presented an issue of fact as to whether NYK did furnish or provide the considera-

tion out of which the bank account involved arose. The trial court said:

> "The trial, which was to the Court without a jury, (was) presented two issues for decision, one of fact and one of law, as follows:
>
> I. Did NYK furnish, or provide the consideration out of which the bank account involved arose?
>
> II. Even if it did, was it a transaction to which the courts can give judicial recognition since it was in violation of Federal laws?" (R. 39.)

The trial court in its Opinion then stated:

> "These issues arise out of the *following set of facts, as disclosed by the record.*"

The trial court then proceeded to state the facts disclosed in the record which may be summarized as follows:

1. That NYK prior to the freezing controls imposed by Executive Order No. 8832, had operated the steamship vessel "M. S. Tatuta Maru" between the United States and Japan.

2. That NYK had incurred various obligations to American creditors arising out of the operation of its said vessels prior to July 26, 1941, when Executive Order No. 8832 was issued.

3. That efforts of the Japanese Government to have NYK exempted from the freezing order were unsuccessful. Being unsuccessful in exempting NYK from the freezing order, the Japanese Government

requisitioned NYK's "Tatuta Maru" and operated it as a requisitioned vessel.

4. That the Japanese Government, The Yokohama Specie Bank, and NYK were prohibited by the freezing orders from transferring any credit from a bank in Japan to a bank in the United States, and from making any payment to the bank in the United States if the Japanese Government or any Japanese national had any interest, direct or indirect, in such payment, unless such transfer or payment was licensed by the Secretary of the Treasury of the United States.

5. That the Japanese Government applied to the United States Treasury Department for a license to open the bank account involved by receiving a remittance in the sum of $39,000 from the Japanese Government through The Yokohama Specie Bank, Ltd., Tokyo Office, for deposit in the local bank.

6. That subsequent applications were filed and the Japanese Government in every application made to the United States Treasury Department represented and warranted that no one other than the Japanese Government had any interest, direct or indirect, in the bank account.

7. That NYK in written application to the United States Secretary of Treasury admitted under oath that all receipts and all disbursements concerning the operation of the Japanese requisitioned vessel were independent and had no connection with NYK funds.

8. That the Japanese government authorized NYK to act as its attorney in fact in all matters, business,

operations, and affairs arising out of the operation of the Japanese Government requisitioned vessel.

9. That all transactions concerning said bank account were had under licenses issued by the Treasury Department pursuant to applications made therefor. (R. 39-45.)

The trial court then stated appellant's contention to be as follows:

> *"That NYK in fact furnished the money with which the Japanese Government opened the Special Account in The Yokohama Specie Bank, Ltd., San Francisco Office, and was thus the beneficial owner thereof."* (R. 45.)

The trial court after stating that it was appellant's contention that NYK had furnished the money in the bank account and therefore claimed the beneficial ownership thereof, then stated as a fact that there was questionable evidence indicating that NYK did furnish the money, stating as follows:

> "In this case, while there is evidence of questionable competence that indicates that NYK furnished the money with which the Special Account was opened, it does not follow that a trust relationship was thereby created." (R. 46.)

The court had previously pointed out the nature of the evidence submitted by appellant in support of his contention that NYK had in fact furnished the money, and then stated:

> "To find such a trust relationship the Court would have to rely on opinions and conclusions

> of the witness and on certain correspondence had between NYK Tokyo and Japanese Government officials, months and even years after the events herein and after the interests of the United States had intervened. When this evidence is weighed against the undisputed evidence that the Tatuta Maru was operated as a Japanese Government requisitioned vessel, that NYK and the Government of Japan stated under oath that no one other than the Government of Japan had any interest in the bank account involved, and that NYK applied for and received permission from the Treasury Department, to be paid an agency fee for its handling of the ship, it falls short of meeting the 'clear and convincing' test necessary to establish a resulting trust." (R. 46-47.)

It is respectfully submitted that when the trial court said "To find *such* a trust relationship the court would have to rely on opinions and conclusions . . . it falls short of meeting the 'clear and convincing' test necessary to establish a resulting trust", the court was only referring to the resulting trust claimed by appellant in its contention "that NYK in fact furnished the money with which the Japanese Government opened the Special Account in The Yokohama Specie Bank, San Francisco and was thus the beneficial owner thereof." (R. 45-47.)

It is submitted that the only logical interpretation that can be placed on the foregoing statement of fact made by the trial court in its Opinion is that appellant had offered questionable evidence in support of its contention that NYK had furnished or provided

the money in the bank account and the trial court found as a fact that NYK did not furnish or provide the consideration because the trial court had weighed the evidence opposed to that of appellant on the issue and resolved the conflict of evidence in favor of appellees.

It is of utmost significance that the trial court then went on to add:

> "Had plaintiff (appellant) succeeded, however, his position would be no better." (R. 47.)

This statement of the court can only be interpreted to mean that the court found as a finding of fact that plaintiff had not succeeded in proving or establishing the fact that NYK furnished the money and thus became the beneficial owner of the account.

In the formal Findings of Fact made and entered by the trial court, the court again in Findings I through XIII made the special findings as contained in its Opinion heretofore summarized. (R. 50-55.) The court then made the following specific findings:

> "XIV.
>
> That any and all services performed by said NYK concerning the operation of said steamship vessel from the period of October 14, 1941 to and including December 7, 1941 was as an agent on behalf of the Imperial Government of Japan.
>
> XV.
>
> That on November 21, 1941 said NYK was paid the sum of $4,771.58 by the Imperial Government of Japan for all services rendered by NYK as

agents for the Imperial Government of Japan in the operation of the said vessel by the Imperial Government of Japan for the period from October 14, 1941 to and including November 21, 1941.

XVII.

That the Japanese Government was at all the times during the period of the foresaid transactions the *sole, legal and beneficial owner of the funds* in said account; *that the balance of said account in the sum of $66,882.15 was never at any time held by the said Yoshio Muto in trust for, or on behalf of, NYK; and that NYK never had any beneficial interest in, or ownership of the said balance of said account.*" (R. 55-56.) (Emphasis.)

The opening of the bank account and all transactions concerned therewith occurred after October 14, 1941. Since the court found specifically that NYK performed any and all services as an agent on behalf of the Imperial Government of Japan, the foregoing findings can only be construed to mean that NYK itself did not provide the consideration. This is especially true in view of the fact that NYK collected over $66,000 in passage fares as an agent for the Japanese Government for passage on the Japanese Government requisitioned and operated vessel.

In *Frederick v. Baxter Arms Corporation* (1939), 107 F. (2d) 732 plaintiff brought an action to establish a resulting trust as to real properties held by the defendant. It was plaintiff's contention that one Elizabeth Bunge had furnished the consideration for

the taking of the title in defendant's name. As stated by the appellate court "the case therefore turned upon discovering whether Elizabeth or her mother and brother were the beneficial owners of the fund with which Elizabeth originally purchased the property in 1930". Appellant contended that the trial court had erred in failing to make a finding as to whether Elizabeth had furnished the consideration or a portion of the consideration with which the property involved had been purchased, specifically alleging as error the failure of the trial court to make a separate finding as to whether Elizabeth had furnished cash in the sum of $1,200.00 and also value represented by certain securities. The appellate court in rejecting appellant's alleged assigned error stated as follows:

> "We think however that the general finding that the 'fund and securities' in question were not property of Elizabeth, but were the property of her mother and brother, is adequate to include these items (cash and securities) also."

In this case as in the *Frederick* case the trial court found specifically that the Japanese Government was "the sole, legal and beneficial owner of the fund in the bank account", and "that NYK never had any beneficial interest in, or ownership of the said balance of said account", and it is submitted that said findings alone include and embody the unrequired-more-detailed evidentiary finding that NYK did not furnish or provide the consideration represented in the balance of the bank account.

IV.

THE OPINION OF THE TRIAL COURT PROVIDES A CLEAR UNDERSTANDING OF THE BASIS OF THE TRIAL COURT'S DECISION, AND EVEN THE ABSENCE OF A FINDING AS TO WHETHER NYK FURNISHED OR PROVIDED THE CONSIDERATION OR MONEY, WOULD NOT CONSTITUTE REVERSIBLE ERROR.

This case was tried before an able and experienced trial judge. The trial judge before entering judgment rendered a clear, complete and comprehensive written Opinion, setting forth the basis of the trial court's decision. (R. 37-49.) The trial court in its Opinion made a complete and correct appraisal of the evidence and the law to the end that a sound decision has been made and has provided the Appellate Court with a guide to its decision. As shown elsewhere in this brief, the court's decision is supported by the evidence.

Under the above circumstances, this court is bound by the rule recently stated by this court in *Burnham Chemical Co. v. Borax Consolidated* (1948), 9 Cir. 170, F. (2d) 569, Certiorari Denied 69 S.Ct. 655, 336 U.S. 924, Rehearing denied 69 S.Ct. 878, as follows:

> "Respecting the failure to make findings where the Opinion of the trial court is before us, see *Hazeltine Corporation v. General Motors Corp.*, 3 Cir. 131, Fed. (2d) 34, 37. The Opinion here provides a clear understanding of the basis of the decision below, and the absence of Findings of Fact and Conclusions of Law is not sufficient to justify a reversal of the case."

V.

THERE WAS A SUBSTANTIAL CONFLICT IN THE EVIDENCE AS TO WHO PROVIDED OR FURNISHED THE CONSIDERATION OR MONEY REPRESENTED BY THE BALANCE IN THE BANK ACCOUNT.

Appellant's second assigned error is that "the District Court erred in holding that the evidence of appellee (Exhibit F, H, I, J, & K) is contradictory to the resulting trust theory of appellant". (Appellant's Opening Brief page 12.)

Under this assigned error, appellant has stated his position to be as follows:

> "It is appellant's position that there is no contradiction in the evidence introduced by appellees and that introduced by appellant." (Appellant's Opening Brief page 13.)

Appellant in his argument in support of this assigned error complains of the fact that the trial court made certain of its findings from evidence introduced by appellant and at the same time rejected and disregarded other portions of the evidence contained in the same document introduced in evidence by appellant. It is submitted that as to those portions of the documents from which the court in its Memorandum and Opinion embodied as conclusively established facts there was no evidence offered by appellees in contradiction thereto, but as to that portion of the same documents which the trial court rejected there was substantial and conclusive evidence in contradiction thereto. Thus it becomes readily apparent that appellant's criticism of the trial court in this regard is completely unjustified.

The only evidence offered by appellant to establish that NYK actually operated the ship and furnished the consideration out of which the bank account arose and that the Japanese Government conceded that the bank account involved belonged to NYK were statements in the form of opinions and conclusions made in correspondence between NYK and the Japanese Government more than one year to seven years after the transaction involved had been completed. They were made at a time when NYK Tokyo was trying to obtain money from the Japanese Government. They were made at a time when the rights of the United States Government had intervened.

After seven years of negotiations between NYK Tokyo and the Japanese Government, during which period the position of NYK was that the Japanese Government was under a duty to forthwith pay the monies advanced by NYK to the Japanese Government without reference to the bank account involved or without any reference to an asserted claim by NYK to the bank account involved, the Japanese Government advised NYK Tokyo of its position, as follows:

"September 6, 1948

To President,
Nippon Yusen Kabushiki Kaisha,
Re: Compensation problem resulting from Operation of Repatriate Ships executed Immediately prior to Outbreak of Pacific War

With reference to the pending problem of compensation of the subject matter, it is understood

that a decision was reached at that time by the Finance Ministry authorities whereby five hundred twenty thousand nine hundred and fifty-nine yen ninety-nine sen paid by you to this Ministry and transmitted to America would be dropped in accordance with the War Indemnity Special Measures Law and frozen funds other than the above would be handled as overseas assets. *Against this decision, petitions were filed by your letters Ei-Gyo-Gai No. 19 of May 31 last year (1947) and Ei-Yu-Gai No. 53 of August 12.* As a result of various negotiations conducted thereafter by this Ministry with the Finance Ministry, an answer has been received as views of the Accountant's Bureau that the aforementioned amount remitted to the U. S. too should not be governed by the War Indemnity Special Measures Law and essentially it should be taken into consideration in connection with the disposition of the overseas assets as part of the balance of the special account of the Consulates in America which is your company's funds. Details are as per the attached letter from the Accountant's Bureau. *This Ministry has no objection to this and should like to appreciate your understanding on the matter.*

Chief of General Affairs Bureau,
Ministry of Foreign Affairs"

(R. 215-216; Emphasis added.)

The only conclusion that can be drawn from the foregoing letter is that the Japanese Government would have no objection to treating the bank account involved as that belonging to NYK. It does not contain an admission by the Japanese Government conceding that the bank account belongs to NYK.

The letter from the Chief Accountant's Bureau to the Chief of the Foreign Affairs Bureau, Ministry of Foreign Affairs referred to in the letter from the Chief of General Affairs Bureau, Ministry of Foreign Affairs to the President of NYK stated in part as follows:

"Re: *Compensation for Losses* resulting from Operation of Repatriate Ships for Japanese Nationals in North American and Southern Region executed immediately prior to Outbreak of Pacific War.

With reference to the above caption, the view of this Bureau is as follows, and we shall appreciate your getting in touch with the Nippon Yusen Kabushiki Kaisha.

I. Concerning North America

1. Nature of the requisition of October 10 for the 'Tatsuta Maru', 'Hikawa Maru', and 'Taiyo Maru'.

As documents relating to the said requisition order are untraceable, *it is impossible to draw a clear conclusion as to the nature of this requisition; however, deducing* from various circumstances it is believed that in nature the ships were requisitioned ones of the Japanese Government on account of the freezing order of Japanese funds by the United States, but their operation and the relevant accounts were at the responsibility and risk of the Nippon Yusen Kabushiki Kaisha. The decision made by the Cabinet on September 30 was that: 'It is expected that there will be almost no loss coming from this navigation, because no cargo will be loaded though passengers are slated

to be booked in full. *Should a loss be incurred by chance the Government will compensate the loss after examination of the actual operation expenditure.' On the basis of this, Yusen actually received from the Ministry of Communications as subsidy the balance between the necessary expenses for the special navigation of ships for this case, and passenger fares and other revenues, the balance amounting to one million five hundred and forty-two thousand five hundred and five yen seventy-six sen (July 7, 1952). This fact, indeed, testifies to the above views of this Bureau, and it is considered that the operations for this case were to be executed on the account of the Yusen (Nippon Yusen Kabushiki Kaisha).* It was only to avoid the freezing of funds that part of the funds was administered as a special accounts of the Consulates.

2. Nature of the Remittances from homeland by Yusen and the Special account of the Consulates.

Whereas the Yusen then had no available funds which were necessary in North America to operate ships owing to the freezing of their funds, as an expedient funds amount to Y520,959.99 were remitted by them to Consulates in America through the means of remittance by the Ministry of Foreign Affairs. *Therefore, it should not be considered, as the side of Yusen asserts, that it advanced the funds that should have necessarily been remitted by the Government.*

Actually the special accounts of the Consulates were monies belonging to Yusen and they only took the form of special consular accounts owing to the Freezing Act.

3. Since the stand of items Nos. 1 and 2 is taken, the amount of Y520,959.99 remitted should be considered as included in the balance of the special accounts of U. S. $149,192.69 (equivalent to Y636,555.48 in Japanese currency exchanged at the rate 23 7/16 as of December 7, 1941) of the Consulates in America and *should be taken into consideration in connection with the disposition of overseas assets and should not be paid immediately now.*

4. For reference, the Canadian money $7,218.90 and the U. S. money $1,000 (31,636.91 yen), which were appropriated to cover the expenses of the Consulate in Vancouver, should be taken into consideration together with the similar cases in the Southern Regions, and this, too, should not be paid immediately now.

II. Concerning Southern Regions.

For this navigation the operation was not executed as a requisitioned ship but in the usual manner by Yusen, and therefore, should be disposed of as an overseas assets. As for the special equipment expenses and demurrage, they cannot be taken into consideration because the Cabinet decision itself concerning the indemnity of losses is not clear." (R. 212-214.)

The above letters typically demonstrate the hearsay opinions on which appellant relied to establish his resulting trust theory. They also demonstrate the conflict in appellant's own evidence concerning the facts on which appellant relies to establish resulting trust.

In addition to the contradiction in evidence shown by appellant's evidence, the following evidence in the

record introduced by appellees was in direct contradiction to appellant's evidence:

1. During the time the bank account was opened, NYK under oath, in writing, admitted that it did not have any interest, direct or indirect, in the proceeds or funds of this bank account. NYK stated and represented in a verified written application that:

> "All receipts and all disbursements entered into this operation are independent and bear no connection with the Nippon Yusen Kaisya funds." (R. 310.)

2. On October 17, 1941, the Imperial Government of Japan gave a written Power of Attorney to NYK to operate the ship as the attorney in fact for the Imperial Government of Japan. (R. 313.)

3. NYK admitted under oath in writing that the Japanese Imperial Government had requisitioned the M. S. Tatuta Maru and that NYK was merely acting as an agent for the Imperial Government of Japan in the operation of the ship. (R. 309-313.)

4. NYK deposited the passage money collected into the Consul General's account at a time when NYK itself maintained a four figure commercial deposit account in the same bank. (R. 343-344.)

5. The sum of $66,937.43 collected by NYK for the sale of passage fares and deposited into the account involved was not money or consideration furnished by NYK. This passage money was paid to representatives of the Japanese Government by numerous individuals seeking passage on the Japanese Government requisitioned and operated ship. This money had

never belonged to NYK and never at any time did the American creditors of NYK have the right to look to this money, nor did NYK ever have a right to claim it as its own. As shown above, NYK merely collected the money as agent for the Japanese Government. It was paid to the Imperial Government of Japan by Japanese nationals living in the United States who were anxious to be repatriated to Japan. (R. 94-117.)

6. Not only does the evidence show that this money was collected from individuals in the United States on behalf of the Imperial Government of Japan for passage on the ship operated by the Imperial Government of Japan, but it also showed that NYK received an agency fee for collecting this money on behalf of the Imperial Government of Japan. (R. 332-336, 343-344.)

It is significant that this agency fee was paid by the Japanese Government to NYK on November 21, 1941, more than a month after the bank account involved had been opened and after the proceeds from the sale of tickets had been collected and deposited therein. It is inconceivable that appellant would contend that NYK was at all times the beneficial owner of the fund, and yet receive an agency fee for effecting collection of the fund for the Imperiad Government of Japan.

7. No records of NYK made at the time of the transaction involved or otherwise, were produced by appellant to show that NYK was operating the ship or that it was collecting the passage fares in its own behalf.

8. Without a Treasury License as required under the Freezing Order, the transfer money in which NYK had an interest, direct or indirect, to the local bank was impossible. All applications for a license authorizing deposit of money into the bank account involved were in the name of the Imperial Government of Japan by the Japanese Consul. The applications were made to cover only the receipt into the bank account of money belonging solely to the Imperial Government of Japan. All Treasury Licenses issued authorized deposit into the account of money belonging solely to the Imperial Government of Japan. Under these circumstances, the transfer of funds in which NYK had a direct or indirect interest in the bank account could not be made without a license issued by the Treasury Department of the United States. That such funds could not be so transferred is clearly established by the decision of the Supreme Court of the United States in the case of *Propper v. Clark* (1949), 337 U.S. 472.

VI.

THE RECORD CONTAINS CLEAR AND SUBSTANTIAL EVIDENCE SUSTAINING THE FINDING OF FACT OF THE TRIAL COURT THAT THE TATUTA MARU WAS A JAPANESE GOVERNMENT REQUISITIONED VESSEL.

Appellant in his third assigned error, maintains that:

> ". . . the requisitioning of M. S. Tatuta Maru by the Japanese Government, in accordance with the uncontradictory testimony of the agreement be-

tween the two governments, was a *formality* only, whereby the vessel was able to secure immunity from legal process by American creditors." (Appellant's Opening Brief page 14.)

Appellees do not contend that the Imperial Government of Japan requisitioned *ownership* of the NYK ship. However, the record discloses without contradiction that the Japanese Government requisitioned the use of the NYK ship for the voyage involved, including the proceeds collected for passage on the ship. For the requisitioning of the use and operation of the ship, the Japanese Government agreed to compensate NYK for any loss it might sustain arising out of the Japanese Government's use and operation of the ship.

The necessity for the requisitioning of the use of the ship for the benefit and account of the Japanese Government arose out of the following circumstances:

1. As a result of the monetary freezing orders, NYK had suspended the operation of its ship and services in the United States. (R. 197-198.)

2. Due to the application of the freezing order to Japan and the nationals thereof, over 2000 Japanese nationals were left stranded in the United States. The Japanese Government was anxious to return its nationals to their homeland. Due to the freezing order, NYK was unable to do this for the Japanese Government. In fact, NYK was unable to return its stranded employees. (R. 193-202.)

3. The Japanese Government was unsuccessful in its attempt through negotiations with the United

States to obtain an exemption of NYK from the freezing order. (R. 193-202.)

4. The United States Government informed the Japanese Government that it would be necessary for the Japanese Government to actually requisition the ship with due formality and to make it known to the public that the vessel had so been requisitioned. (R. 199-201.)

On October 14, 1941, the Imperial Government of Japan requisitioned the ship by formally issuing and serving on NYK requisition order No. EN No. 2044. (R. 202-204.) As stated in the requisition order the extent of the requisition of the ship was for the transportation of passengers. In this connection, NYK was to act as an agent on behalf of the Imperial Government of Japan. (R. 203-204.)

The employees of NYK received appointment to the personnel of the Ministry of Communications of the Japanese Government and engaged in the operation of the vessel. (R. 202.) The requisitioning of the vessel was made public in the United States. (Plaintiff's Exhibit 20-E, page 5.) The Imperial Government of Japan gave a written power of attorney to NYK to operate the ship as the attorney in fact for the Imperial Government of Japan. (R. 313.) NYK received a payment of an agency fee from the Imperial Government of Japan as its commission for the collection of passage and excess baggage and freight fares as an agent for the Japanese Government. (R. 332-336.) On October 14, 1941 the Japanese Government

served upon the American Embassy in Tokyo copies of the requisition order together with copies of the scheduled voyage, embarkation orders to supervisors and the Writ of Appointment of officers of the vessels to the non-official staff of the Ministry of Communications of the Japanese Government. At the same time, the circumstances of dispatch of the requisitioned vessel were telegraphed to the Japanese Ambassador in the United States, and delivered to the Secretary of State of the United States. (R. 202-203.)

It is significant to note that the above evidence clearly establishing requisition of the use and operation of the vessel by the Japanese Government was adduced by the appellant. It is unusual that appellant should ask this court to disregard his own evidence clearly showing the requisition of the vessel by the Japanese Government and ask the court in lieu thereof, to adopt other portions of appellant's own evidence consisting of ambiguous and contradictory statements contained in opinions and conclusions rendered years after the transactions had been closed.

The appellant throughout its opening brief tries to convince the court that it should accept the latter opinions and conclusions contained in his evidence upon the theory that the requisition was a mere formality for the purpose of securing immunity from legal process by American creditors. In view of the fact that *actual requisitioning* of the vessel was required to secure the immunity of legal process desired, appellant's contention that the requisitioning was a mere formality becomes unsound.

It is respectfully submitted that the statements of all parties made at the time the transactions occurred should be accepted rather than the statements made years after the completion of the transaction involved. The statements made at the time of the transaction unequivocally sustain the trial court's finding that the Tatuta Maru was requisitioned and operated in good faith by the Japanese Government.

VII.

APPELLEES CONTEND THAT EVEN IF NYK DID FURNISH OR PROVIDE THE CONSIDERATION OR MONEY REMAINING IN THE BANK ACCOUNT, IT WAS AN ILLEGAL TRANSACTION IN VIOLATION OF FEDERAL LAWS AND CANNOT BE GIVEN JUDICIAL RECOGNITION.

As a general statement of law, when it is shown by clear, convincing, unambiguous evidence that a transfer of property is made to one person, and the consideration therefor is paid by another, a resulting trust is presumed to result in favor of the person by or from whom such payment is made. However, the courts have uniformly refused to apply this general rule where the transaction was one in violation of a Federal statute.

The complaint alleges that the bankrupt NYK endeavored to evade the provisions of the Government Freezing Order, which froze the funds of enemy aliens and prohibited the receipt by the local bank of any money belonging to NYK or in which NYK might

have any interest, without first obtaining a license to do so from the United States Treasury Department.

There is no question but that any plan and scheme of NYK to place its own money in the account involved, would be one in violation of Federal law, prohibited by the Freezing Order. It would have been an illegal act. To accept appellant's theory the entire transaction was one designed to contravene and evade our Federal statutes, and the regulations of the Treasury Department of the United States.

Under these circumstances the law will not impose or create a resulting trust.

The general rule applicable is set forth in 54 *Corpus Juris* (*Trusts*), Par. 147, page 372 as follows:

> "To raise a resulting trust the transaction must be honest; a resulting trust cannot arise from acts contrary to public policy or a statute nor in favor of the guilty party out of acts which have their origin in a fraudulent purpose, as where a person conveys property to another in fraud of his creditors . . ."

The law of California follows this general rule and is stated in 25 *Cal. Jur. (Trusts),* Sec. 122, page 259, as follows:

> "The trust will not be enforced where it exists by virtue of a contract which is illegal—such, for example, as a contract involving a fraudulent acquisition of public lands. *Again, in a case of a resulting trust, relief will be denied where the evidence shows that the money was paid by the*

plaintiff in furtherance of a scheme to defraud the Defendant." (Emphasis ours.)

The reason for the rule is that the situation permits of and requires an application of the maxim, "*Ex turpi causa non oritur actio.*"

As stated in *Wise v. Radis,* 74 Cal. App. 765, at page 775:

> "No principle of law is better settled than that a party to an illegal contract or an illegal transaction cannot come into a court of law and ask it to carry out the illegal contract or *to enforce rights arising out of the illegal transaction.*"

In *Takeuchi v. Schmuck* (1929), 206 Cal. 782, plaintiff paid $500.00 as a deposit on account of the purchase price for real property. Plaintiff's father, a Japanese alien, had furnished the $500.00. In addition, plaintiff had paid taxes on the land. Plaintiff brought an action to recover the deposit and taxes paid. Defendant dealt with the father and knew it was against the law for the father to have any beneficial interest in the property. Defendant also knew that it was the father's money. The situation was therefore the same as this case where NYK and the Japanese Government both knew it was against the law to place funds in the local bank without first obtaining a license if NYK had any direct or indirect interest therein. In that case the court said:

> "It has long been the rule of law that courts will not compel parties to perform contracts which have for their object the performance of acts

against sound public policy either by decreeing specific performance or awarding damages for breach . . . *This rule is not generally applied to secure justice between parties who have made an illegal contract but from regard for a higher interest—that of the public, whose welfare demands that certain transactions be discouraged.* In the instant case the action is not based upon an affirmance of the illegal contract by seeking specific performance or damages for breach, but on an avoidance or rescission thereof, the object of plaintiff being to recover a deposit made and thus restore the status quo. Nevertheless, the parties had conspired to effect a transfer in violation of the provisions of the act and by so doing had rendered themselves amenable to criminal prosecution. The cause of action arises from an illegal transaction. The gravity of the offense is indicated by the severity of the penalty attached, which is imprisonment in the county jail or state penitentiary not exceeding two years or a fine not exceeding $5,000 or both."

"It is with much hesitation that we have been brought to the point of holding that the law will not interfere to unloose the grasp of defendants upon the moneys involved in this appeal. While the law will not, upon grounds of public policy, afford relief to either party to an illegal transaction such as this one is shown to be, it is, nevertheless, proper to say that in the forum of good conscience the defendants are not justified in retaining possession of the money in suit. They were conspirators in an attempt to violate the statute in the same sense as were the Japanese father and daughter with whom they dealt, and their con-

duct, because of their citizenship, was more culpable than was the conduct of the ineligible alien or his daughter, who was of alien blood. The law, however, in this class of cases, provides no remedy for either of the offending parties." (Emphasis ours.)

Takeuchi v. Schmuck (supra) at pages 787 and 788.

In *Mitchell v. Cline,* 84 Cal. 409 at pages 415 and 416, the court held:

"The alleged agreements and understandings relied upon by the appellants are contrary to the express provision of the Revised Statutes above quoted, and contrary to the policy of the express laws of the United States regulating the occupation, possession, and sale of the public mineral lands. The avowed purposes of these agreements were, that, by false and fraudulent representations, the parties thereto should obtain from the government the title to about 150 acres of mineral land in violation of express provisions of law, and that they should make an equal division of the land thus obtained among themselves. Now they have succeeded in thus obtaining the land, will a court of equity stoop to investigate and enforce those parts of the agreements and understandings relating to a division of that land among the conspirators? I think not."

Civil Code, Section 1667;

Damrell v. Meyer, 40 Cal. 166;

Huston v. Walker, 47 Cal. 484;

Snow v. Kimmer, 52 Cal. 624.

"The following language of this court in *Beard v. Beard,* 65 Cal. 356, is applicable to this case: The entire transaction between the parties is tainted by fraud, and the plaintiff must content himself with so much of the benefit of it as he has already secured unchallenged. The reason why the common law says such contracts are void is for the public good, and we think that the public good required that this transaction should be held to be void in all its parts. It was a contract which contemplated the perpetration of a fraud upon a court of justice, and we think it the duty of courts to discountenance and discourage such transactions to the utmost limit of their power.

"In the case at bar a fraud upon the government was not only contemplated, but was actually and successfully perpetrated; and the appellants are shown to have 'secured and unchallenged' about one-half of the benefits thereof, with which they should content themselves.

"See also *Pomeroy's Equity Jurisprudence,* Section 401, where, among other things in point here, it is said: Where two or more have entered into a fraudulent scheme for the purpose of obtaining property in which all are to share, and the scheme has been carried out so that all the results of the fraud are in the hands of one of the parties, a court of equity will not interfere on behalf of the others to aid them in obtaining their shares, but will leave the parties in the position where they have placed themselves."

In *Moore v. Moore* (1900), 130 Cal. 110, plaintiff brought an action to establish a trust to land, legal

title to which stood in the name of his son. The son in order to obtain title had made false and fraudulent representations in his application to the government for purposes of obtaining a patent title to the land. The son claimed he did this for the plaintiff's benefit and agreed to hold the property for the plaintiff.

> "By the allegations of this complaint the son of plaintiff conceived and set in active operation a fraud upon the government of the United States, by which, through flagrant perjury, he undertook to acquire title to a part of the government domain. The plaintiff, knowing this, consented that the fraud should be consummated, upon the assurance that the title acquired should subsequently be conveyed to him. *He seems to think that no one was interested in the scheme other than himself and his son, and that he may be heard to complain in a court of equity because a title thus fraudulently secured from the government by false representations and perjury, to which he was a consenting party, was not afterward conveyed to him. He forgets, however, the higher interest of the general government, and overlooks the dictates of public policy.* That the agreement between the father and son was for the consummation of a fraudulent, imposition upon the government there can be no doubt, and plaintiff's right of recovery under his pleading looks to the enforcement of this illegal contract. As was said by Judge Duncan in *Swan v. Scott,* 11 Serg. & R. 164: The test whether a demand connected with an illegal transaction is capable of being enforced is whether the plaintiff requires the aid of the illegal transaction to establish his case. If the plaintiff cannot estab-

lish his case without showing that he has broken the law, the court will not assist him, whatever his claim in justice may be upon the defendant." (Emphasis ours.)

Moore v. Moore (supra), at pages 112 and 113.

"Ordinarily the parties to a contract, void because contrary to public policy, will be left where they are, when they come to the court for relief."

Brooks v. Brooks (1944), 63 C.A. (2d) 671 at 676.

"It is well settled that a recovery cannot be had by either party in reliance upon an illegal contract . . . Where a party must disclose an illegal contract to establish his case the action necessarily is contractual in nature."

Kings Laboratories v. Yucaipa Vol. F. Co. (1936), 18 C.A. (2d) 47 at 48-49.

"More specifically, the court will not aid a party to recover property which has been used by him in violating the laws prohibiting lotteries, or which is designed for that purpose. (Citing cases.) The reasons for refusing the aid of the court become even stronger when the property, by reason of its illegal use, has incurred a forfeiture and is liable to proceedings by the state to ascertain and enforce that forfeiture."

Nicolli v. McClelland, 21 Cal. App. (2d) 759 at 765.

Appellant, as trustee of the bankrupt, NYK, can assert no greater right than could have been asserted by

NYK. He is chargeable with the fraud and perjury of NYK.

"A trustee in bankruptcy stands in the shoes of the bankrupt, except as against fraudulent conveyance and similar transactions and can assert no greater right against one by whom premises were leased to bankrupt than could have been asserted by the bankrupt in the absence of bankruptcy proceedings."

Schultz v. England (1939), C.C.A. Cal. 106 F. (2d) 764, 42 Am. Bkr. Rep. N.S. 249.

"A trustee in bankruptcy cannot acquire a greater right or interest in bankrupt's property than that which belonged to the bankrupt."

Martin v. New York Life Ins. Co. (1939), C.C.A. Ill, 104 F. (2d) 573, 124 A.L.R. 1163, 40 Am. Bkr. R. N.S. 317, certiorari denied 1940, 60 S. Ct. 123, 308 U.S. 594, 84 L. Ed. 497.

The trustee in this action does not contend that this transaction was a fraudulent transfer or preference within the meaning of the Bankruptcy Act. There is no allegation whatesoever that NYK was insolvent at the time of said alleged transfer or was made insolvent thereby.

To rely on insolvency it must be pleaded and proved.

"Insolvency must be pleaded and proved."

Duke v. Low (1931), 296 Pac. 45;

In re Clinton Wine & Liquor, 40 Fed. Supp. 106.

It is respectfully submitted that under the law as established by the foregoing decisions this court should not and cannot give any judicial recognition to appellant's claim to the beneficial ownership in the bank account involved.

Appellant concedes that NYK and the Imperial Government of Japan conspired to effect a transfer of funds to the account in the local bank in direct violation of the provisions of the freezing order. As stated by the trial court:

> "To recognize the plaintiff's claim would be, in effect, to give judicial approval to an illegal scheme designed to evade the provisions of the freezing order." (R. 47.)

Since legal title to the bank account stood in the name of Yoshio Muto, appellant cannot escape the fact that the aid of an illegal transaction to avoid the effect of the freezing order is necessary to establish his claim. Under the foregoing decisions, upon it appearing that appellant to establish his case has shown the violation of the freezing order, the court cannot assist him in any manner, whatsoever his claim in justice may be to the bank account involved.

Appellant seeks to avoid the limitations and restrictions imposed by the foregoing decisions, and the decision of the Supreme Court of the United States in the case of *Propper v. Clark* (supra), by urging the court that he is not seeking to have the bank account actually transferred by decree of this court to the appellant. Appellant concedes that unless the trustee

obtains a license from the Treasury Department, this court is without authority to enter a judgment or decree transferring the bank account to appellant. Appellant argues that he is relieved of the limitations and restrictions arising from the foregoing decisions because he is only asking the court to determine in whom beneficial title to the bank account should rest and further states "at this stage of the proceedings the only issue before the court is, who has the greater right to title to the fund, the Alien Property Custodian or the American creditors of NYK". (Appellant's Opening Brief page 30.) Appellant is not so relieved. For this court to judicially recognize appellant's alleged claim of beneficial title to the fund or to determine by judicial decision who is factually entitled to the money in the bank account, would in effect place the stamp of judicial approval upon the fraud, perjury, and conspiracy of NYK and the Japanese Government in evading the provisions of the freezing order. Appellant's distinction in the type of relief he seeks of this court as compared to the relief sought in the foregoing cases is one of form and not of substance. The foregoing decisions have unequivocally established that judicial recognition in any form cannot be given to such illegal, fraudulent, and unlicensed transaction.

Appellant contends that he is seeking a transfer within the framework of the Executive Orders and is not attempting to by-pass the Executive Orders. The fallacy of this contention of appellant lies in the

fact that he is confining the limitations and restrictions of the foregoing decisions to the present transfer he seeks from the Superintendent to the appellant and completely ignores the illegal and fraudulent transfer in violation of the freezing order which gave rise to the bank account. In order that appellant be under no misapprehension as to the unlicensed transfer of which appellees complain, we desire to have it clearly understood that the unlicensed transfer of which we are complaining is the telegraphic transfer of the sum of $39,000 from The Yokohama Specie Bank, Ltd., Tokyo Office, to the local bank and the deposit in the bank account involved of the passage fares collected upon the representation and warranty that no one other than the Imperial Government of Japan had any direct or indirect interest therein. The licenses granted by the Secretary of Treasury did not authorize the creation or the maintenance of the account if NYK was the beneficial owner of any part of the account. The legal effect of such an unlicensed transaction has been judicially determined by the Supreme Court of the United States in the *Propper* case (supra). As held in that decision and as conceded by appellant in his opening brief (Appellant's Opening Brief page 29) this unlicensed transaction is null and void and can confer no right to NYK, through whom appellant's claim arises, which will receive judicial recognition.

CONCLUSION.

NYK, through whom the appellant claims his right to the bank account, was prohibited by the Freezing Order from depositing any money into the account involved herein, without first obtaining a license from the U. S. Treasury Department. To deposit money into a bank account, in which NYK had a beneficial interest, would be in violation of Federal law, punishable by fine and imprisonment. The evidence without contradiction showed that NYK in writing under oath, admitted that it did not have any interest whatsoever in the account involved. The Japanese Government, in writing, under oath, stated that no one other than the Japanese Government had any interest in said bank account. The evidence clearly shows that the Japanese Government placed its own money into the account for the purpose of operating the ship which it had requisitioned from NYK. The Japanese Government applied for and obtained proper licenses from the U. S. Treasury Department to open the account with its own money for the purpose of operating the ship which it had requisitioned. Under these circumstances, the transaction was one in which NYK did not have any beneficial interest. As such, it was a legal and valid transaction and the bank account involved belonged solely to the Imperial Government of Japan.

Appellant's claim to the bank account can only evolve around a transaction initiated in fraud and consummated in perjury. Where the evidence submitted by all of the parties is subject to two different interpretations—one legal and in compliance with the

law, and the other fraudulent, illegal and in circumvention of the Federal law—then that interpretation should be given to the transaction which would make the transaction a legal one and in conformity with the provisions of the Federal law.

Appellant's claim rests solely upon the theory that NYK furnished or provided the consideration for the bank account involved. Appellant failed to establish by clear, convincing and satisfactory evidence that NYK did furnish or provide the consideration for the bank account involved.

Appellant seeks by this action to establish a windfall for the American creditors of NYK. Never at any time did the American creditors of NYK have a right to look for payment from moneys or assets of NYK which were owned or found in Japan. NYK should not be permitted to reap any rights to which it was not legally entitled to by reason of the fact that the Imperial Government of Japan deposited in the local bank the sum of $39,000 by means of a telegraphic transfer from The Yokohama Specie Bank, Ltd., Tokyo Office, to the local bank and the further sum of approximately $68,000 as proceeds received by the Japanese Government from its operation of the ship involved. There was no evidence adduced showing fraud of any kind having been perpetrated against the American creditors of NYK. In fact, the evidence shows that the United States Government advised the Imperial Government of Japan that it would not permit said Government to defraud the American creditors of NYK. It was by reason of the fact that NYK

had American creditors, that caused the Japanese Government to requisition and operate the ship involved and to deposit the monies belonging to the Imperial Government of Japan into said bank account. The taking over and the operation of the ship by the Imperial Government of Japan cannot be said to be in fraud of American creditors. Under no other circumstances would the United States Government have allowed the ship to make the voyage and have allowed the opening of the bank account.

The bank account is in the name of Yoshio Muto, Counsul General of Japan, but it belongs to the Imperial Government of Japan. It has been vested by the Office of Alien Property. It should be paid to the Office of Alien Property as a vested account.

There is no theory, legal or equitable, under which appellant can recover. For the reasons stated, it is respectfully submitted that judgment of the trial court should be affirmed.

Dated, San Francisco, California,
May 5, 1952.

S. M. Saroyan,
Shirley, Saroyan, Calvert & Barbagelata,
Counsel for Appellees,
The Yokohama Specie Bank, Ltd., of San Francisco (a foreign corporation), and Maurice C. Sparling, as Superintendent of Banks of the State of California and Liquidator of The Yokohama Specie Bank, Ltd., San Francisco Office.